Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1802

MARLIN REEVES ..... Petitioner

v.

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. _____

MARLIN REEVES ..... *Petitioner*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Marlin Reeves, prays a writ of certiorari issue to review judgment of the United States Court of Appeals for the First Circuit entered on this matter April 19, 1976, and Order Staying Mandate entered May 13, 1976.

CITATIONS TO OPINION BELOW

Opinion of Court of Appeals is not reported. Attached hereto is copy of opinion, as Appendix A, and Order Staying Mandate, as Appendix B.

JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered April 19, 1976

and Order Staying Mandate May 13, 1976. Jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) A co-defendant, John Allen Berry, has filed with this Court a petition for a writ of certiorari. In order to avoid duplication, this petitioner, Marlin Reeves, adopts by reference all points raised by said John Allen Berry in his petition for writ of certiorari, insofar as the same relate to him.

(2) Whether a Court in applying the balancing test set forth in *Barker* v. *Wingo,* 407 U.S. 514 and *Moore* v. *Arizona,* 414 U.S. 25 may insist on a showing of prejudice to the defense at trial as essential to establish a federal speedy trial claim.

(3) Is a defendant who had asserted a speedy trial claim prejudiced by the death of a character witness who had been chief of police of defendant's home town, who had known defendant well his entire life, who could have testified as to defendant's honesty, truth and veracity, when defendant at trial testifies in his own behalf, and where the government vigorously attacks his credibility.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On January 8, 1973, defendant, along with co-defendants Gilbert Porter Cox, Cecil Allen Berry and John Allen Berry, were indicted by the Grand Jury for the Western District of Tennessee, Western Division, and charged with conspiracy, counterfeiting, in violation of Title 18 U.S.C. Sections 473, 2, 371 and 472.

On January 11, 1973, defendant was arraigned before the District Court, entered a plea of NOT GUILTY, and filed a secured bail in the sum of $25,000.00.

On February 6, 1973, defendant filed with the District Court a Motion for Fast and Speedy Trial. Co-defendants Cecil Allen Berry and John Allen Berry filed identical motions. Co-defendant Gilbert Porter Cox did not file such motion.

On March 6, 1973, by letter, the District Clerk advised defendant his trial was set for May 14, 1973. However, six days prior to trial date, an Assistant United States Attorney advised defendant's attorney the case was being continued.

On March 28, 1973, the District Court entered an Order granting defendant's Motion for Speedy Trial.

On May 22, 1973, the government filed its Motion to Sever defendant Gilbert Porter Cox from the other defendants and

asked that his trial precede that of the other defendants.

On June 8, 1973, defendant filed his response to the Motion to Sever wherein he set forth that the District Court had granted his Motion for Speedy Trial, that defendant Cox had not made such motion, and to be forced to await trial of Cox would be denial of defendant's right to speedy trial.

On June 19, 1973, by letter, the District Clerk advised all four defendants trial was set for September 24, 1973.

On July 16, 1973, the District Court entered its Order granting severance of Gilbert Porter Cox from other defendants and directing that the Cox trial precede and be concluded prior to trial of the other defendants. The Order further set the date for the Cox trial as July 30, 1973.

On July 24, 1973, by letter, the District Clerk advised defendant that his trial had once again been reset for November 5, 1973.

On October 24, 1973, by letter, the District Clerk advised defendant that his trial had again been reset for February 18, 1974.

On November 14, 1973, by letter, the District Clerk advised defendant that his trial was reset to February 19, 1974.

During the fall of 1973, a witness for defendant, Marvin Gunn of Forrest City, Arkansas, died and was no longer available to testify for defendant. Mr. Gunn, Chief of Police of defendant's home town, had known defendant his entire life, and would have testified as to defendant's honesty, truth and veracity.

On February 19, 1974 defendant filed his Motion To Dismiss for Failure to Provide Speedy Trial.

Trial of defendant commenced February 19, 1974. Defendant testified in his own behalf. The government vigorously attacked his credibility, and in doing such used the successor Chief of Police of Forrest City, Arkansas, a person defendant charged had "harrassed" him unjustly for years.

On February 26, 1974, an evidentiary hearing was held on defendant's Motion to Dismiss for Failure to Provide Speedy Trial. Defendant testified that two witnesses were now unavailable for his trial. One being Chief of Police Marvin Gunn of Forrest City, Arkansas, who had died of a heart attack the past summer, and the other was Hershel McMinn, who had died during this trial. Both would have been character witnesses for defendant and would have testified to other matters of a rebutting nature. Defendant further testified that during the thirteen months between indictment and trial he had suffered anxiety, his association with friends had been curtailed, his family had suffered embarrassment, and his business had been seriously affected. He stated that people who knew of his indictment for counterfeit money were reluctant to trade with him. Subsequent to the hearing the court entered its order denying the Motion.

A jury verdict of Guilty on all three counts was returned March 1, 1974.

Judgment and commitment of defendant to serve five years was entered May 9, 1974.

Appeal was taken and in its opinion (Appendix A) the Court of Appeals found that the length of delay (13½ months)

was sufficient for further inquiry, that defendant did assert his right to speedy trial, that defendant had alleged generally he was embarrassed by the delay, that his business had suffered, that he had lost by death two character witnesses, but it did not impair his defense sufficiently to warrant reversal.

An Order Staying Mandate for thirty days was filed May 13, 1976 pending application to this Court for a writ of certiorari.

REASONS FOR GRANTING WRIT

I. This writ should be granted in order to claify to Courts of Appeal what weight, if any, should be attached to factors other than prejudice to the trial of a defendant in applying the balancing test for speedy trials. The Courts of Appeal give lip service to the *Barker* v. *Wingo* test, yet invariably unless a defendant makes an affirmative demonstration of prejudice to his defense at trial, his assertion of right to speedy trial is denied.

In the instant case the time lapse from indictment to trial was in excess of thirteen months, and was unduly long — particularly with this defendant from the outset demanding his right to a speedy trial — the trial court, by order, saying he could have that right — yet eleven months elapsed after an order granting a speedy trial was entered, and the date of defendant's trial. The framers of the Sixth Amendment would by no stretch of the imagination have considered such other than "lip service" to a speedy trial right.

The government was at all times in absolute and total control as to when, if ever, defendant would be brought to trial. Further, defendant never at any time attempted to delay time of

trial. The Appeal Court refers to disposition of motions filed by defendant. These motions were quickly disposed of one way or the other at the same time motion for speedy trial was granted. The government, without prior notice or explanation to defendant, on five different times during the 13 month period, proceeded to set, then reset a date for defendant's trial. After continuing the first trial date, the government severed a co-defendant from defendant's trial and tried his case prior to defendant. The co-defendant never asserted a right to speedy trial. The government now alleges this was done to use co-defendant as a witness at defendant's trial, yet it did not do such. Defendant timely entered his objection.

Defendant asserted and demanded his right to a speedy trial on February 6, 1973. On March 6, 1973, the Court set date for trial as May 14, 1973, and then on March 28, 1973, caused an order to be entered granting a speedy trial. Defendant, later, in response to the government's motion to sever a co-defendant, on June 5, 1973, re-asserted and demanded his right to speedy trial. At no time was such ever waived. As a matter of fact, during the entire course of events from shortly after arrest through the Court of Appeals the government was plainly placed on notice that the speedy trial issue was being preserved by the accused, and would be pressed. Yet the government seemed totally unconcerned to this basic constitutional right.

Prejudice was suffered by defendant personally. During the long thirteen month period between indictment and trial he testified as to disruption in family life, economic losses, curtailment of associations, anxiety and undue emotional stress due to the government repeatedly setting — then re-setting — the date for his trial. The uncertainties as to when, if ever, he would receive his constitutional right to trial by jury hung like the

sword of Damocles over the head of defendant. All the while, defendant was asserting his right to speedy trial, being told by the Court he would have a speedy trial, dates being set, then re-set, and leaving defendant totally frustrated. The Court of Appeals summarily dismissed these prejudices in administering the balancing test set forth in ***Barker*** v. ***Wingo*** and later in ***Moore*** v. ***Arizona,*** 414 US at 26 & 27 where this Court states, "Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings."

II. This writ should also be granted to clarify for Courts of Appeal if a defendant who has asserted a speedy trial claim is prejudiced at his trial by the death of a character witness — not the ordinary character witness, but Chief of Police of defendant's home town, who had known defendant his entire life, and who would have testified as to defendant's honesty, truth and veracity — when defendant at trial testifies in his own behalf, and where the government vigorously attacks his credibility. In this case defendant was charged and tried in Memphis, Tennessee, a metropolitan area some forty or fifty miles distant from his home in Forrest City, Arkansas. Defendant testified that shortly after arrest he had spoken to, and had obtained assent from Chief of Police Marvin Gunn of Forrest City to testify, among other matters, as a character witness. Chief Gunn died in early fall of 1973 — after the government had re-set defendant's trial at least twice. Defendant elected to testify in his own behalf at trial, and in doing such contradicted government witnesses — some of dubious character. The government vigorously attacked his credibility to the jury, and in doing such used the successor Chief of Police of Forrest City — a person defendant charged had "harrassed" him unjustly for years. The death and unavailability of Chief Gunn seriously prejudiced

defendant. Who can deny that one on trial away from his home, before a jury of strangers, testifying in his own behalf with the government attacking his credibility, is not injured by the unavailablity of his home town Chief of Police, who has known him his entire life, and who could favorably testify as to defendant's reputation in the community for truth, veracity and honesty? Who can deny that this witness would have been most persuasive in supporting defendant's credibility with a jury? Such a character witness could not be replaced. Yet the Court of Appeals in applying its balancing test says this is not substantive testimony in the establishment of a defense and therefore did not impair the defense.

CONCLUSION

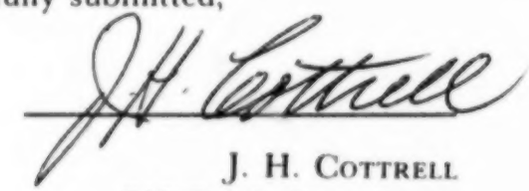
PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a writ of certiorari, for which this is the first application, issue from this Court to the United States Court of Appeals for the Sixth Circuit directing said Court and the Clerk thereof to certify and transmit to this Court the entire record of the proceedings in this cause for review.

2. That this case be placed upon the docket of this Court for argument and that the judgment of the Court of Appeals for the Sixth Circuit be reversed and the errors complained of by petitioner herein be corrected by this Court.

3. That the petitioner have such other, further, and general relief to which he may be entitled.

Respectfully submitted,



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APPENDIX A

Nos. 74-1954, 55, 56
No. 75-1820

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARLIN REEVES, GILBERT PORTER COX, JR., JOHN ALLEN BERRY, CECIL ALLEN BERRY,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 19, 1976

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The four appellants were convicted of counterfeit-related offenses. The defendant Cox was tried separately and found guilty by a jury of possession of counterfeit money in violation of 18 U.S.C. § 472, delivery of the same bogus money in violation of 18 U.S.C. § 473 and conspiracy to violate laws relating to counterfeiting. Upon examination of the record we find that the statement which Cox made incriminating himself and implicating the other three defendants was freely and voluntarily given and was properly admitted at his trial. There is an abundance of evidence to support his con-

viction of the conspiracy as well as the substantive charges. The argument that he was denied effective assistance of counsel by his retained attorney, who also represented other persons charged as accomplices, is totally without merit. The district court noted a possible conflict in interests early in the proceedings and called it to the attention of the parties and the attorney. The defendants informed the court that they desired to continue to be represented by the same attorney.

The other three defendants were tried together. The record contains sufficient evidence to support the jury verdict that Reeves and Cecil Berry conspired to violate the laws which prohibit possession and delivery of counterfeit money, as well as the substantive offense of possession of such money and aiding and abetting Cox in the delivery of bogus bills to a federal agent. The evidence is also sufficient to uphold the conviction of John Berry on the conspiracy charge. However, in light of a concession at oral argument by counsel for the government, we vacate the conviction of John Berry on the charge that he aided and abetted in the delivery of counterfeit bills.

We have considered the arguments of all defendants that the district court erred in admitting selectively chosen tape recordings of conversations in which the disposal of counterfeit money was discussed. These were consensual recordings which were properly admitted. The testimony of Henry Mizell was very damaging to all of the appellants. He recorded some of the conversations which were heard by the jury. He was vigorously cross-examined by defense counsel and serious questions of credibility were raised. The appellants argue that the prosecution failed to disclose an agreement not to prosecute Mizell. There is absolutely no support in the record for the claim that there was such an agreement. This case is clearly distinguishable from *Giglio* v. *United States,* 405 U.S. 150 (1972), relied on by appellants. It is also contended that the Sixth Amendment right of confrontation was denied appellants by

the court's restriction of their cross-examination of Mizell. The court ruled that Mizell was not required to disclose the identity of a person in Little Rock, Arkansas with whom he had discussed the sale of counterfeit bills. In view of the remoteness of this transaction from the activities forming the basis of the charges against the appellants we find no abuse of discretion in the trial court's ruling.

The Berrys and Reeves have presented a speedy trial issue. All four defendants were indicted on January 8, 1973. On February 6, 1973 both John and Cecil Berry and Reeves made motions for a speedy trial. Cox never made such a motion. After a hearing, the district court granted the motion of the three defendants on March 28, 1973, noting however that none of the defendants was in jail and that it would be some time before they could be tried since the court was "swamped." As has been noted previously, the defendant Cox had confessed and his statement had implicated the other three. The district court granted the government's motion for a severance and set the trial of Cox ahead of the joint trial of the three remaining defendants. Eventually Cox went to trial on February 4, 1974 and the trial of the other three defendants began on February 19, 1974. Meanwhile, on February 15, 1974 Reeves had moved for dismissal for failure to grant a speedy trial.

When one convicted of a criminal charge contends that he was denied his constitutional right to a speedy trial, the reviewing court must apply a balancing test on an *ad hoc* basis. *Barker* v. *Wingo,* 407 U.S. 514, 530 (1972). This requires consideration of a number of pertinent factors, including length of delay, reason for delay, whether the defendant asserted the right and whether the defendant has been prejudiced by the delay. The length of the delay in the present case — 13½ months — is sufficient to require further inquiry, though by no means conclusive of the issue.

There were a number of reasons for the delay in the present

case. This was an involved conspiracy situation, not an "ordinary street crime." ***Barker, supra,*** 407 U.S. 531. Furthermore, the prosecution had a legitimate interest in trying Cox first in an effort to use his confession against him and possibly obtain his testimony against the other three defendants. ***See Barker,*** 407 U.S. at 534; ***United States*** v. ***Fairchild,*** 526 F. 2d 185, 187 (7th Cir. 1975). As has been noted, Cox and the Berrys were represented by the same attorney who made no motion for a speedy trial on behalf of Cox. The apparent strategy of the defense was to avoid having Cox tried first and the government was entitled to counter this strategy.

The crowded docket of the court, the need to dispose of numerous motions filed by the defendants and the illness of Cecil Berry all contributed to the delay in bringing the two Berrys and Reeves to trial. This was not a case where a single factor chargeable to the prosecution caused the delay. When delay has been caused by such "neutral" factors, it has been held that the right to a speedy trial has not been abridged in the absence of a specific showing of prejudice. ***United States*** v. ***Mulligan,*** 520 F. 2d 1327 (6th Cir. 1975); ***United States*** v. ***Scott,*** 518 F. 2d 261 (6th Cir. 1975); ***United States*** v. ***LaBorde,*** 496 F. 2d 965 (6th Cir. 1974).

Since the defendants did assert their right to speedy trials, the remaining question is whether or not they suffered prejudice by reason of the delay. As this court has noted, this is the most important factor to be considered when the speedy trial issue is raised. ***Trigg*** v. ***Tennessee,*** 507 F. 2d 949, 954 (6th Cir. 1974), ***cert. denied,*** 420 U.S. 938 (1975). None of the defendants was incarcerated for more than a few days and no specific claim of prejudice was made on behalf of John or Cecil Berry. Reeves alleged generally that he was embarrassed by the delay and that his business was injured. His chief contention was that his defense was impaired by the death of two witnesses, one of whom was the former chief of police of his home town. Both of

the people who died pending trial would have been called as character witnesses only, and it is not seriously claimed that either could have offered substantive testimony in the establishment of a defense. Reeves called other character witnesses on his behalf, and the current chief of police testified for the government. Under all the circumstances disclosed by the record in this case we do not believe that the death of the two character witnesses so impaired the defense as to warrant reversal on the speedy trial issue. *Cf.* ***United States*** v. ***Scherer,*** 523 F. 2d 371, 378 (7th Cir. 1975).

The judgment of the district court is affirmed as to Cox, Reeves and Cecil Berry and as to the conviction of John Berry on the conspiracy charge and vacated as to John Berry's conviction for aiding and abetting. The case is remanded to the district court for dismissal of the charge against John Berry of aiding and abetting in the delivery of counterfeit money.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 74-1954

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARLIN REEVES,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order

denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

Filed: May 13, 1976
John P. Hehman, Clerk